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Office of Administrative Law Judges
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DATE: May 17, 1988
CASE NO: 86-ERA-36

IN THE MATTER OF

RONALD J. GOLDSTEIN
COMPLAINANT

v.

EBASCO CONSTRUCTORS, INCORPORATED
RESPONDENT

Before: ROBERT J. BRISSENDEN
Administrative Law Judge

RECOMMENDED SUPPLEMENTAL DECISION AND ORDER

Pursuant to Number 6 of my March 3, 1988 Recommended Decision and Order, at page 13 and to the Errata Order of March 4, 1988, Complainant's attorneys have filed a petition for attorney fees and costs. Respondent's counsel has timely filed a response.

Initially, I must deal with Respondent's contention that the

Government Accountability Project group (hereinafter GAP) failed to, file within the time clearly set forth in the Recommended Decision and Order and in the Errata Order. Respondent is correct that the plain meaning of the Order is that the time limit is to be ten days from issuance of the Recommended Decision and Order. However, my attorney-

adviser's memoranda of various telephone calls indicate that the trial attorney for GAP may not have received a copy of the Recommended Decision and Order (hereinafter D. & O.) at her particular home-office address, even though the mail delivery to GAP's Washington, D.C. office was within a day or so after delivery to attorney Hooper (for Respondent) in Houston, Texas. Further, such memoranda indicate that Ma. Billie Garde (for Complainant) reported the delay to this office, advised my attorney-adviser that she would be in communication with Mr. Hooper, and requested additional time to prepare her Fee and Costo petition. Assuming that there had been such communication between counsel, as was strongly encouraged from the time this judge was assigned the case, the extra time was granted. The postmark date shows that the petition was filed within the extended time limit. I therefore rule that the submission was timely. However, I take note of the failure to adequately communicate with adverse counsel so as to avoid any appearance of an ex parte communication. Recently, an attorney for GAP telephoned my attorney-adviser to request the opportunity to file a response to Respondent's response. Such a subject should have been handled by a conference call, after a discussion with Mr. Hooper. Since the request was denied, further inquiries into communications between adverse counsel were not made.

The Energy Reorganization Act (ERA) provides for attorney fees and costs, as follows:

> If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order is issued.

42 U.S.C. Section 5851(b)(2)(b).

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GAP has filed for attorney fees based on the work done by its attorneys Billie P. Garde and Richard E. Condit.

In addition to observing guidelines along the "lodestar" approach of the *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp*. case, 487 F.2d 161 (3rd Cir. 1973), I have considered the cases of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983) and *Pennsylvania v. Delaware Valley Citizens' Council* cases; 106 S. Ct. 3088 (1986) and 107 S. Ct. 3078 (1987).

In the 1986 *Pennsylvania v. Delaware Valley Citizens' Council* case, the Supreme Court stated that the product of multiplying the reasonable number of hours times a reasonable hourly rate was presumed to be the reasonable fee, though upward adjustment vas permissible only in certain "rare" or "exceptional" cases. The latter type of case must be supported by specific evidence and detailed findings. *Pennsylvania*, (1986) at 3098.

Although I have considered some of the 12 factors of the *Johnson v. Georgia Highway Express, Inc*. case, 488 F.2d 714 (1974), part of these "factors" are either discarded by *Lindy Bros., supra* or by the *Pennsylvania v. Delaware, supra* cases.

In determining the reasonable hours for this case, I have kept in mind that GAP has been handling whistle blower cases for a few years and its published works (see pp. 8, 9 and 10 of the Petition) should be readily available to Ms. Garde and Mr. Condit. Accordingly, research for this relatively simple case represented by Ms. Garde's hours are cut down. "Research" should not have been required for the regulations and the Act on this case at all and a minimum of time was needed for the cases on "protected activity" and the "dual motive" concepts. GAP attorneys were well versed on these cases. The controversy between the decisions in the Fifth Circuit and the Ninth Circuit along with the Secretary's position on this issue would not require lengthy time to research. Legal research by Mr. Condit was not excessive, but I consider his work in that regard duplicative.

It is only in the field of research that I feel that the two attorneys had sufficient experience to prepare a case such as this for trial. Since the trial itself affords the only opportunity for a judge, in this type of case, to observe the quality of work, I am basing my calculation, of reasonable hours times a reasonable hourly rate, on the handling of the trial. In my opinion the trial

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of a case seriously affecting Complainant's entire professional career should never have been put in the hands of a novice attorney with such limited trial experience. Ms. Garde undoubtedly has great potential but her presentation of evidentiary material bad serious flaws, especially in the handling of witnesses. From the outset of the assignment of the case, it was observed that Ms. Garde could not meet deadlines, failed to communicate with adverse counsel and did not fully inform the court of such failure. I can well understand attorney Hooper's frustration with communications by Ms. Garde with my clerk, Ms. Nutt, to gain extra time for the brief and the submission of the Fee and Costs petition. In each instance assurances were given that there had been communication with Mr. Hooper's office. It now appears that that may not have been the case. However, whatever was gained by the extra time was not reflected by the final product, since I found Mr. Hooper's brief and response to the Attorney Fee petition superior in quality to the documents of the GAP attorneys. The failure to communicate with adverse counsel on a matter of meeting deadlines, though serious, I attribute to inexperience. The calling of my clerk direct, without arranging for a conference call, for requests of various types, no matter how meritorious, should have been preceded by a discussion with adverse counsel, at the least. A recent request to "respond" to Mr. Hooper's Response to Attorney Fee Petition certainly does not appear to be proper and fair to adverse counsel. Such request as mentioned above vas turned down, and the other matters mentioned above have not resulted in adverse consequences to Respondent, but all such ex parte requests are considered as evidence of inexperience.

Due to lack of experience, the trial preparation is considered non-productive for the most part, especially in view of the results at trial. An example of this was the testimony of Mr. Goldstein, the Complainant. Mr. Goldstein wandered from subject to subject in his testimony with many of the subjects being totally irrelevant to proving the simple three step prima facie case.[1] Proper preparation of Goldstein, considering that he was an intelligent man, would have been to instruct him on giving short responsive answers, Unfortunately, many of the questions were worded in such a way that they encouraged rather than discouraged long irrelevant answers. Very properly, Mr. Hooper did not object to questions of this sort since such meandering answers were not a threat to his defense. However, such poor questioning and long answers unnecessarily lengthened the trial. The failure to prepare

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adequately for trial also was evident when Goldstein was not called back as a rebuttal witness, after a particularly strong (defense witness. Such was a serious tactical error which, were it not for the excellent testimony of one of the witnesses called by the Complainant, certain documents and the believable quality of Mr. Goldstein's relevant testimony, might have cost Complainant his case. I consider the testimony of the aforementioned witness to have been a key factor, not through any good preparation by counsel for the Complainant, but because that particular witness was experienced in testifying and had a particularly logical mind. By contrast I noted that Mr. Hooper's good trial skills brought about an orderly procession of witnesses, short responsive answers and the ability of witnesses to handle cross-examination well. The contrast between opposing counsel was marked.

Although some of the documentary evidence was of great importance to the Complainant, much of such evidence was minimally relevant and not worth the excessive time devoted to questions put to witnesses about same or to the introduction of it. Proper trial preparation could have eliminated some of such documents or at least relegated them to a possible use for impeachment depending on unexpected developments at trial.

Accordingly, I have deducted many hours of trial preparation and conferences listed prior to the hearing dates, and during the hearings, for Ms. Garde. I have deducted almost all of the trial preparation hours listed by Mr. Condit along with his time spent at the trial. Condit had, if anything, less experience than Garde, therefore it is difficult to see how he could have been of any assistance at the trial. It would be unfair for the defense to pay for observers. An excessive amount of time was spent by both of Complainant's attorneys on "research," on the preparation of the post-hearing briefs and on the Fee petition work. Much of the material attached to the Fee petition was immaterial to the issue of the attorneys' worth to Mr. Goldstein on this case, impressive as GAP's general work in this field may be. As the Respondent's attorney properly argued, the institutional strength of GAP bears neither on litigation experience nor on the efforts on Goldstein's behalf. The research and preparation of the post-trial brief included time spent in reviewing Mr. Hooper's post-trial brief, clearly supporting Hooper's argument of extra tine gained by the

Complainant to the disadvantage of the defense. Clear instructions were that there would be as close to a simultaneous submission of briefs as possible. Further, much time on the research and

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preparation of the brief by Complainant's attorneys should have been much shorter since this case required little that GAP attorneys had not already become familiar with prior to handling this case. Total hours deducted from the Condit and Garde listed hours: 304.6 hours.

I find the lodestar hours for Condit and Garde to be 106.7 hours.

I reject attorney Hooper's viewpoint that paralegal hours are to be deducted totally. Such may be considered part of the "costo and expenses" mentioned in the Act. Nevertheless because of the excessive "digesting" of transcripts, depositions, the "legal research" duplication and the totally unfair digesting of Respondent's brief, my cuts of the paralegal hours will be draconian. I will cut all of Ms. Bauman's hours as either a duplication of attorney's work or properly the province of the trial attorney. Sandra Shepherd was observed to be of assistance in keeping track of trial exhibits at the time of trial, and she was certainly needed to organize the paper work for trial along with assisting in communicating with witnesses. All of the balance of work is considered unnecessary and an unreasonable cost and expense, I cut 541.7 hours from the paralegal work. The voluntary deductions of travel time and the unexplained drop of one-third of Ms. Shepherd's hours are noted, but since such was confusing I chose to take the hours listed in Appendix A. This leaves 34.5 paralegal hours that I find as reasonable expenses directly relating to the preparation for and the trial of the case.

I next address the hourly rate that I consider reasonable for the work done by the trial attorney and her assistant to determine the lodestar rate.

First, I do not find this case to be the rare or exceptional case contemplated by the United States Supreme Court in the 1987 *Pennsylvania v. Delaware Valley Citizens' Council supra*, case, This case was one with clear and definite factors to be proven, and involving two differing views of "protected activity." The law on the opposing views of two circuits and the Secretary's choice were very clear, though sharply differing between the two appellate courts. As has been stated above, the trial handling was poor and at times endangered the Complainant's case due to lack of trial skills. Therefore there will be no enhancement of the lodestar fee. Such fee is presumed to be the reasonable fee and unnecessary

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to enhance. *Pennsylvania I* (1986) at 3098.

Second, I reject attorney Hooper's point of view that the scale should be a lower one because this was an "administrative" bearing. The instant case was heard as an adversary hearing equivalent to any non-jury trial in a court of unlimited jurisdiction. I *do* consider the merit of Mr. Hooper's comment that using Washington, D.C. firms for comparison is improper since Ms. Garde's insistence in receiving mail pertaining to this case at her Appleton, Wisconsin address gave her certain advantages and such would more properly be the geographic area for determining the customary rate for attorneys of her experience. Unfortunately, neither counsel submitted the customary rates for attorneys in the latter area. Having considered the factors listed in *Pennsylvania I* and the earlier case of *Blum v. Stenson*, 104 S. Ct. 1541, 1548-1550, i.e. special skill and experience of counsel, quality of representation, and the results obtained, I have already pointed out the limited experience and the poor quality of representation. I need only add that the results obtained had little to do with the representation. The elements assisting Goldstein in winning his case have been mentioned. Further, I will add that Complainant's damages were only incidentally proven with no discernible plan. The stipulation on damages was partially unenforceable under the Act and no argument on damages was submitted in Complainant's brief. Accordingly, the results obtained were akin to those of the ordinary associate trying his first case.

It would be unconscionable to allow rates at the partnership level of the listed firms. The United States Supreme Court, in discussing fee-shifting statutes, stated:

> A strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws.

Pennsylvania I, Id. at 3098.

I find that the hourly rate for the two attorneys should be set at the lower end of the scale for associates in the prestigious Washington, D.C. firms listed. I find that $65.00 per hour is the lodestar hourly rate. The lodestar fee is therefore 106.7 times $65.00, or $6,935.50.

The paralegal expense of $35.00 per hour is proper. The total allowable paralegal hours of 34.5 times $35.00 is ,207.50.

Provided that business records, bills and receipts are produced for Respondent, the expenses listed on page 20 of Complainant counsel's petition are approved, with the exception of "out-of-office" copying which is considered part of normal office overhead.

Recommended Order

IT IS RECOMMENDED THAT:

1. Respondent pay Complainant attorneys $6,935.50 for attorney fees, ,207.50 for paralegal expense; and

2. Respondent pay those expenses listed in page 20 of Complainant Attorney's Fee Petition, in the total amount of $9,981.00, provided that Respondent be presented with office records, bills and receipts supporting such expenses

ROBERT J. BRISSENDEN
Administrative Law Judge

RJB:jl

[ENDNOTES]

[1] (1) the party charged with discrimination is an employer subject to the Act.

(2) the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and

(3) the alleged discrimination occurred because the employee engaged in "protected" activity. *De Ford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).